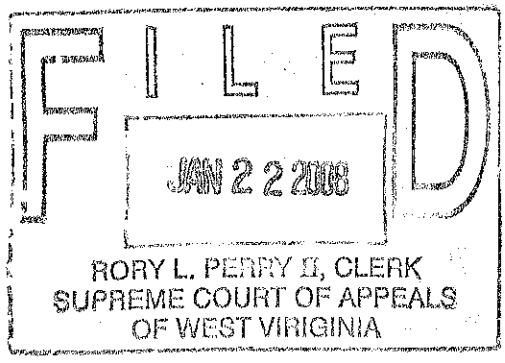
33529

No. ~~32529~~

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

STATE OF WEST VIRGINIA, RESPONDENT

V. JOSHUA C. WEARS, PETITIONER



REPLY TO BRIEF OF APPELLEE STATE OF WEST VIRGINIA

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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

STATE OF WEST VIRGINIA,

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v.

JOSHUA C. WEARS,

Petitioner.

APPELLANTS' REPLY TO BRIEF OF APPELLEE STATE OF WEST VIRGINIA

I. KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

The State's recitation of the Kind of Proceeding and Nature of the Ruling Below is generally correct with the exception of the information contained in Footnotes No. 1 and 2. In Footnote No. 1, the State alleges that the Appellant has not served a copy of his Motion to Supplement the Record with Newly Discovered Evidence upon the State of West Virginia. However, Appellant's counsel served that Motion upon the Putnam County Assistant Prosecuting Attorney by first-class mail on the 15th day of August, 2007, as verified by the Certificate of Service

attached to said Motion. Therefore, the State of West Virginia has been properly served with the motion.[1]

Apparently, the Attorney General's office was aware of the above referenced Motion because he attempts to address the same within Footnote No. 2. Appellee's counsel states "specifically, a letter dated almost three months before the Appellant entered his guilty plea from Putnam County Prosecuting Attorney Larry Frye" informed the Appellant of this newly discovered evidence. This is a misrepresentation. Assistant Prosecuting Attorney Larry Frye forwarded the new evidence to Appellant counsel with a cover letter dated July 17, 2007, almost nine (9) months after the Appellant entered his conditional plea. The new evidence was in the hands of the prosecuting attorney's office almost three (3) months prior to the plea.

Appellant presumes the State does not oppose the Motion considering the Appellant has not received a response to said Motion from the State of West Virginia despite this Court's November 20, 2007 Order requiring a response within thirty (30) days.

II. ARGUMENT

A. The Appellant's Issue Regarding Credit for Time Served is Largely Moot, but May Still be Addressed by This Honorable Court.

As noted in the Appellant's brief, the Trial Court reconsidered its initial ruling regarding the denial of credit for time served after this Honorable Court

[1] Appellate counsel did not receive any information which would indicate the Attorney General's office would be representing the State in this matter until he received a letter dated September 19, 2007 addressed to Putnam County Prosecuting Attorney, Mark Sorsaia, stating that the Attorney General's office will undertake to defend the appeal unless directed otherwise by the Putnam County Prosecuting Attorney.

accepted the Petition for Appeal to the Motion Docket. By doing so, the Trial Court has rendered a majority of the Appellant's argument regarding credit for time served as technically moot. Nevertheless, this Court may still address this technically moot issue.

This Honorable Court has set forth three factors to be considered in deciding whether to address technically moot issues. The factors are set forth in Syllabus point 1 of Israel which states the following:

> Three factors to be considered in deciding whether to address technically moot issues are as follows: first, the [C]ourt will determine whether sufficient collateral consequences will result from determination of the questions presented so as to justify relief; second, while technically moot in the immediate context, questions of great public interest may nevertheless be addressed for the future guidance of the bar and of the public; and third, issues which may be repeatedly presented to the trial court, yet escape review at the appellate level because of their fleeting and determinate nature, may appropriately be decided.

Israel by Israel v. West Virginia Secondary Schools Activities Commission, 182 W.Va. 454, 388 S.E.2d 480 (1989).

In the case *sub judice*, the facts by which the Trial Court initially denied credit for time served are subject to repetition because most defendants are initially arrested in magistrate court and bound over to the grand jury in circuit court as opposed to being arrested for the first time after a grand jury indictment. A definitive ruling on this subject will provide future guidance to the bar and the public when credit for time served is requested for felonies which are initiated through an arrest warrant in magistrate court. A defendant should be entitled to credit for time served following his arrest in magistrate court when he enters a plea in the circuit court to a crime arising from the same factual scenario. This specific

issue has not been addressed by this Honorable Court through a syllabus point and could be clarified by a ruling at this time.

B. The Appellant Offered an Adequate Proffer Regarding Evidence of the Victim's Prior Sexual Conduct.

The Appellee argues that the Appellant's proffer was insufficient; however, when the information provided through proffer is analyzed, it is readily apparent that it was sufficient to allow the Court to conduct a balancing test and that the Appellant should have been permitted to present the evidence as a reasonable theory of defense. As the Appellee concedes, it is permissible to establish the need for the presentation of evidence of prior sexual conduct of a victim by proffer. (See page 12 of Brief of Appellee) In this case, the proffer of Appellant established, at a minimum, the following:

1. The alleged victim had lied to two law enforcement officers regarding her sexual relationship with another perpetrator by concealing that relationship when she was specifically asked about it.

2. The relationship with this other perpetrator was occurring during the same time period in which the alleged victim states that the Appellant assaulted her.

3. The other perpetrator placed hickies on the body of the alleged victim which is the only physical evidence of any sexual encounter.

4. The other perpetrator was approximately thirty (30) years of age and the alleged victim was "consenting" to an ongoing sexual relationship with him.

It is true that the Appellant could not state beyond a reasonable doubt that the alleged victim's parents were not aware of her relationship with the other

perpetrator, but it is simply speculation to conclude otherwise. If the alleged victim's parents knew of this relationship and consented to it, they were acting as accessories to the felony child rape of their own daughter.

The State presented no proffer or other evidence in opposition to the proffer of Appellant counsel. The credibility of the Defendant's witness is not an issue for the Trial Judge to decide, but is an issue for the jury to decide. Further, there was no reason for the Trial Judge to disbelieve the proffer of Appellant counsel. At any time, the State, which had unfettered access to the victim and her parents, could have proffered a rebuttal to the Defendant's proffer and did not do so.

The alleged victim's motive to blame the Defendant must be proved by circumstantial evidence because motive is a state of mind which is rarely, if ever, proven by direct evidence. There is nothing wrong with proving a case entirely through circumstantial evidence. This Court has held that "If, on a trial for murder, the evidence is wholly circumstantial, but as to time, place, motive, means and conduct, it concurs in pointing to the accused as the perpetrator of the crime, he may properly be convicted." Syllabus Point 3, State v. Gum, 172 W.Va. 534, 309 S.E.2d 32 (1983). Certainly, a defendant's circumstantial evidence that another perpetrator committed the crime which concurs as to time, place, motive, means and conduct should be admitted for the jury to consider.

The Appellee notes that the victim's confidential mental health records only reference a sexual assault by two people, but fails to acknowledge that she continues to hide her illegal "consensual" relationship with the other perpetrator. The Appellee states that the affidavit supplied by Appellant counsel reads like a

cheap gossip rag and implies that his theory of the case should be given no weight whatsoever. One wonders if Appellee's counsel would have the same opinion of Atticus Finch's defense of Tom Robinson in Harper Lee's novel *To Kill a Mockingbird.* The fact is, the Appellant made an easy scapegoat for the alleged victim because he was already branded a sex offender which no one would believe.[2]

The Appellee admits that the Appellant's proffer "suggests that a third party may have been responsible for some of the victim's hickies." (See Brief of Appellee at page 12.) The Appellant should have had the opportunity to present this alternate explanation for the alleged victim's injury, including the identity of the other perpetrator. A Federal District Court and various Federal Circuit Courts have found that the exclusion of this type of evidence violates a defendant's *Sixth Amendment* confrontation right. The Federal Court in Grant v. Demskie recited this point as follows:

> Federal courts have held that preventing a rape defendant from showing that the child complainant was previously raped or assaulted in order to offer an alternative explanation for the child's injuries, is disproportionate to the ends the rape shield laws are designed to serve, and violates the defendant's Sixth Amendment confrontation right. E.g., *Tague v. Richards*, **3 F.3d 1133, 1139** (7th Cir. 1993) (defendant should have been allowed to present evidence that the eleven year old victim was previously raped by her father, to advance an alternate theory of why the child's hymen was enlarged and how she got a sexually transmitted disease); *United States v. Bear Stops*, **997 F.2d 451, 457** (8th Cir. 1993) (en banc) (district court improperly limited the defense's proffer that three boys raped

[2] See page 25 and 26 of the transcript of the hearing conducted on July 27, 2006 when Detective Pauley testifies that the alleged victim's acquaintance initiated a sexual act with the appellant months prior to the incident in the case sub judice. Appellant later entered a plea of guilty to battery after being charged with statutory rape.

> the child complainant before the defendant allegedly attacked the child, which could have provided an alternative explanation for the child's exhibition of sexual abuse symptoms); *United States v. Begay*, **937 F.2d 515, 519-23** (10th Cir. 1991) (error to exclude evidence of child's prior rape as alternative theory of how child's hymen came to be injured); *Latzer v. Abrams*, **602 F.Supp.1314, 1319-21** (E.D.N.Y. 1985) (habeas petitioner was denied his Six Amendment right to cross-examine the child complainant and his brother with respect to their sexual relations with other men to establish that the brothers misidentified the accused, where the trial court did not hold a hearing to inquire into the relevance of the brothers' prior sexual conduct).

Grant v. Demskie, 75 F. Supp. 2d 201, 213 (S.D.N.Y. 1999).

The Affidavit was a specific proffer of a witness statement to which the prosecutor chose not to rebut and it was corroborated by the previous lies to law enforcement officers and an admission to the former assistant prosecuting attorney. The proffered evidence was discussed in detail at three pretrial hearings before the Trial Court and provided the Court more than sufficient information to conduct a balancing test. Although the identity of the witness whose proposed testimony was proffered to the Court was not disclosed because the Defendant was not required to provide reciprocal discovery to the State, she had given a statement which was accurately portrayed in the Affidavit of counsel which the Court had no reason to disbelieve.

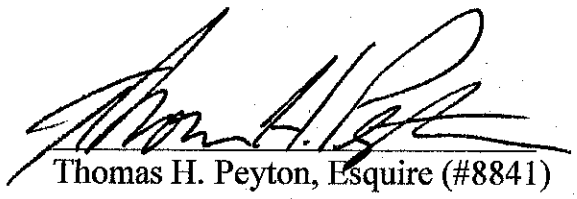
III. CONCLUSION

The Court clearly abused its discretion and violated the Appellant's Constitutional rights when it refused to allow him to present a reasonable theory of defense to a jury of his peers. Therefore, the Appellant respectfully requests that

this Honorable Court reverse the ruling of the Trial Court and remand this matter for further proceedings in accordance with said ruling.

Respectfully submitted this 18th day of January, 2008.

JOSHUA C. WEARS
BY COUNSEL



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BEFORE THE SUPREME COURT OF APPEALS

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Appellant,

v.

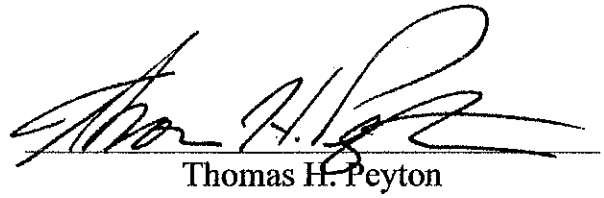
STATE OF WEST VIRGINIA,

Appellee.

CERTIFICATE OF SERVICE

I, Thomas H. Peyton, counsel for Appellant, Joshua C. Wears, do hereby certify that the foregoing "APPELLANT'S REPLY TO BRIEF OF APPELLEE STATE OF WEST VIRGINIA" was served upon the following counsel of record via hand delivery, this 18th day of January, 2008:

Robert Goldberg, Esquire
Attorney General's Office - Capitol
Building 1, Rm. E-26
1900 Kanawha Blvd., E.
Charleston, WV 25305



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